Supreme Court, U. S.
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In the Supreme Court of the United States

No. 76-773

WENDELL GORDON and BERTHA GORDON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

OPINION BELOW 1

JURISDICTION 1

QUESTION PRESENTED 1

CONSTITUTIONAL CLAUSES AND STATUTE INVOLVED 2

STATEMENT 2

ARGUMENT:

A decision from this Court is needed to settle the disputed claim of the United States that it may consume privately-owned sand, soil and gravel from the bed of a navigable river without compensation 4

I. The United States, under claim of right pursuant to exercise of the navigational servitude has appropriated for its own commercial benefit privately-owned property to an extent not encompassed by the navigational servitude 4

II. Petitioners own the natural resources in the submerged island; and the United States does not hold ownership interest therein 7

III. Petitioners' complaint involves an important federal question which has not been, but should be, settled by this Court 9

CONCLUSION 10

APPENDIX:

Memorandum Order of Court of Claims (dismissing) A1

Submerged Lands Act A3

Citations

CASES

Berry v. *Snyder*, 3 Bush 266, 96 Am. Dec. 219 (Ky. 1867) 7
Bonelli Cattle Co. v. *Arizona*, 414 U.S. 313, 318 (1973) 9
Coastal Petroleum Co. v. *United States*, 207 C. Cls. 701, 524 F. 2d 1206 (1975) 10
Fox River Paper Co. v. *Railroad Commission of Wisconsin*, 274 U.S. 651 (1926) 7
Gibbons v. *Ogden*, 9 Wheat. 1, 196 (1824) 5
Gibson v. *United States*, 166 U.S. 269, 275-276 (1897) 4
Lewis Blue Point Oyster Cultivation Co. v. *Briggs*, 229 U.S. 82, 86 (1913) 9
McCready v. *Virginia*, 94 U.S. 391 (1876) 7
Perks v. *McCracken*, 169 Ky. 590, 184 S.W. 891 (1916) 7
Pollard v. *Hagan*, 3 Howard 212, 230 (1845) 5, 7
United States v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596-597 (1941) 4
United States v. *100 Acres of Land in Livingston County, Ky.*, 369 F. Supp. 195 (W.D. Ky. 1973) 2-3
United States v. *Louisiana*, 422 U.S. 13 at 14 (1975) 8
United States v. *Twin City Power Co.*, 350 U.S. 222 (1956) 4
United States v. *Rands*, 389 U.S. 121 (1967) 6

STATUTES AND OTHER AUTHORITY

28 U.S.C. 1255 1
28 U.S.C. 2101(c) 1
43 U.S.C. 1301-1315 2, 7, 8
Ky. Revised Statutes 56.220 7
U. S. Constitution:
Article I, Section 8, Clause 5 2
Amendment Article V, Clause 5 2
Black's Law Dictionary, 4th Ed. (West 1957) pp. 1535, 1489, 599 6

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OPINION BELOW

The opinion of the Court of Claims, expressed in its order dismissing the petition, has not yet been reported. It is set out in the appendix hereto.

JURISDICTION

The order of the Court of Claims was entered on September 10, 1976. The jurisdiction of this Court is invoked through 28 U.S.C. 1255 and 28 U.S.C. 2101(c).

QUESTION PRESENTED

Should the Supreme Court decide the issue of whether the federal government's right of navigational servitude includes the right to use and consume, without compensation, privately owned soil, sand and gravel from the bed of the Ohio River in building a dam and locks in the River?

CONSTITUTIONAL CLAUSES AND STATUTE INVOLVED

Constitution of the United States:

Article I, Section 8, Clause 5,

> "The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Amendment Article V, Clause 5,

> ". . . nor shall private property be taken for public use, without just compensation."

* * *

Submerged Lands Act—Chapter 29, Title 43 U.S. Code [Pertinent Sections], Subchapter I—General Provisions set out in Appendix pp. A3-A5.

STATEMENT

Petitioners own Dog Island in the Ohio River in the Commonwealth of Kentucky.

Respondent is building a dam, to be known as the Smithland Locks and Dam, to aid navigation on the Ohio River, just upstream from Dog Island (a mile and a half above the mouth of the Cumberland River near the small town of Smithland, Kentucky); and respondent is using petitioners' sand, soil and gravel to build that dam.

The United States has taken and paid petitioners for the 112 acres of Dog Island which lay above the ordinary high-water mark (316 feet mean sea level) through eminent domain proceedings initiated on June 3, 1970 (*United*

States v. 100 Acres of Land in Livingston County, Ky., 369 F. Supp. 195 [W.D.Ky. 1973]).

The rest of the island, some 1,200 acres lying between the ordinary high and ordinary low water marks, is the subject of this litigation. The United States estimates that 2,286,500 cubic yards of material from this submerged portion of the island have been dredged and deposited in the Smithland project; and it anticipates the use of approximately 900,000 more cubic yards. None of this material was included in the eminent domain proceedings, nor has any compensation been paid for its consumption.

In response to petitioners' suit in the United States Court of Claims, respondent successfully contended that no condemnation or compensation was appropriate in view of the established principle of the federal navigational servitude.

Petitioners' ownership of the submerged remainder of Dog Island (including alluvion and batture, consisting mainly of sand and gravel) has not been contested. Petitioners can establish that title through deed and inheritance, tracing the chain of their title to a patent from the Governor of Kentucky in 1822, and through judicial and statutory pronouncements.

On the other hand, petitioners have not contested—as they cannot—the vitality of the navigational servitude. Still, petitioners sue upon the assertion of unmet requirements of the Fifth Amendment and upon the theory of an implied contract for benefits wrongfully received by the United States. The gravamen of petitioners' complaint, in the Court below and here, is the claim that the United States may not, without paying, consume for its own commercial benefit those natural resources which it is entitled to move away or destroy.

The Court of Claims grasped the asserted distinction between servitude and proprietary rights.* But that Court decided—incorrectly—against petitioners.

ARGUMENT

A decision from this Court is needed to settle the disputed claim of the United States that it may consume privately-owned sand, soil and gravel from the bed of a navigable river without compensation.

I

The United States, under claim of right pursuant to exercise of the navigational servitude, has appropriated for its own commercial benefit privately-owned property to an extent not encompassed by the navigational servitude.

It is, of course, well settled that navigable rivers are public ways, and the federal government holds absolute authority to insure effective public use of these ways for commerce. The government may deepen, widen, or move channels; it may construct locks and dams, and remove man-made or natural impediments; and it may increase, decrease or destroy the flow of the water. Meanwhile, to any or all of these governmental actions the private citizen who owns submerged land must submit without recompense. See, *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596-597 (1941); *Gibson* v. *United States*, 166 U.S. 269, 275-276 (1897); and *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956).

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*The record in the Court below is short, consisting only of the petition, the response, a short set of admissions, and briefs relating to respondent's motion for summary judgment.

But must he contribute?

Petitioners argued in the Court below, and they pray leave to argue here, that, while the government may remove or destroy their sand, the government may not have it. That is, the established navigational servitude in favor of the United States constitutes a right to disregard or even destroy most of the rights normally pertaining to land-fast real estate. But this servitude does not transfer to the United States any ownership.

> "We are now arrived at the inquiry, What is this power?
>
> "It is the power to *regulate;* that is to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, *other than are prescribed in the Constitution.*" *Gibbons* v. *Ogden*, 9 Wheat. 1, 196 (1824). Emphasis added.

However,

> "By the preceding course of reasoning we have arrived at these general conclusions: First. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. . . ."
>
> *Pollard* v. *Hagan*, 3 Howard 212, 230 (1845).

It is hornbook law that ownership, that is, fee simple title, is a property concept distinct from the servitude. All fee simple titles are subject to some restrictions, such as zoning regulations. Titles to riparian or submerged land are burdened in their own circumstance. But all fee titles, subject to these respective restrictions, include the right to consume the property owned.

On the other hand, the right to consume does not pertain to easements or rights of way unless expressed in the grant. Easements normally entail rights to clear, establish roadways and prohibit impediments in order that the property burdened might be freely traversed for the purposes giving rise to the easement.

Servitudes, easements and rights of way are all of the same nature. *Black's Law Dictionary*, 4th Ed. (West 1957) pp. 1535, 1489, 599.

In none of the decisions relating to the navigational servitude, including those cited above at p. 15 and the draconic decision of *United States* v. *Rands*, 389 U.S. 121 (1967), has this Court implied an award of authority to the United States to consume the natural resources which constitute the riparian or submerged real estate. These decisions deal with the landowners' lack of right to claim against the United States damages for loss of access or special riparian value.

Still, the United States in the instant case has consumed, by putting into its dam, over two and a quarter million cubic yards of petitioners' sand, soil and gravel; and it claims that it is entitled to do this, without leave of or compensation to anyone, solely under authority of the navigational servitude.

If the federal government can do this, then, whenever it feels the need for sand or wishes to aid its treasury, it can simply widen or deepen the channel of the Ohio River, from bank to bank (all in aid of navigation—and its own commerce). Likewise, it could deepen the bays of coastal states to feed its engineers and sailors oysters.

The *navigational* servitude does not exist for such a purpose; and it should not be expanded to include consumption of natural resources whatever the motive or project involved.

II

Petitioners own the natural resources in the submerged island; and the United States does not hold ownership interest therein.

As equally well established as the navigational servitude is the principle that, not the United States, but the respective states, and those who hold under them, own the beds of navigable waters. *Pollard* v. *Hagan, supra; McCready* v. *Virginia*, 94 U.S. 391 (1876). And it is the law of the state involved which determines the nature and extent of the title of the riparian or submerged-land owner. *Fox River Paper Co.* v. *Railroad Commission of Wisconsin*, 274 U.S. 651 (1926).

Under the law of the Commonwealth of Kentucky, petitioners own Dog Island, including all accretions, alluvion and batture down to the natural ordinary low water mark (at the 287 foot elevation contour, mean sea level).* *Berry* v. *Snyder*, 3 Bush 266, 96 Am. Dec. 219 (Ky. 1867); *Perks* v. *McCracken*, 169 Ky. 590, 184 S.W. 891 (1916); Ky. Rev. Stat. 56.220.

In 1953 Congress reaffirmed this ownership with the *Submerged Lands Act*, 43 U.S.C. §§1301-1315 (set out in the Appendix at pp. A3 through A10).

By that Act, Congress declared it to be in the public interest that, "[T]itle to and ownership of the lands beneath navigable waters," including the natural resources, be vested and confirmed in the respective states, "or the persons who [are] . . . entitled thereto under the law of the respective States . . ." 43 U.S.C. 1311(a).

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*As noted earlier, the United States, in condemnation proceedings, took and paid for that portion of the Island above the ordinary high water mark (316 feet mean sea level).

Navigational servitude rights were retained by the United States, but in that retention clause Congress expressly declared that the navigational servitude, "[S]hall not be deemed to include proprietary rights of ownership . . ." of the lands or natural resources. 43 U.S.C. §1314(a).

And Congress decreed, by subsection (b) of section 1314 that the "prevailing market price" should be paid for such natural resources, through purchase or condemnation proceedings, even in time of war.

The United States has argued that this retention of navigational servitude rights somehow overrules the confirmation of ownership of these natural resources in petitioners.

Such a position is not supported by the rulings of this Court relative to the Submerged Lands Act. While litigation arising under that Act has most frequently involved coastal-state disputes with the federal government relating to oil recovery from the ocean beds, the decisions comport with petitioners' reading of the Act. For example, after establishing the seaward boundary line between state and federal jurisdictions, the Court in *United States* v. *Louisiana*, 422 U.S. 13 at 14 (1975), ruled, in part,

> "3. As against the plaintiff United States and all persons claiming under it, the State of Louisiana has exclusive rights to explore the area lying within three geographical miles seaward of its coastline . . . and to exploit the natural resources of said area. . . . The United States is not entitled to any interest in such lands, minerals, and resources . . .
>
> "[5] (b) The United States shall pay to the State of Louisiana or other persons entitled thereto [lessees, etc.] . . . all sums . . . derived from or attributable to the lands, minerals or resources described in paragraph 3 hereof;"

Also subsequent to passage of the Act, this Court has expressed its view that neither the navigational servitude nor state control of ownership of the beds of navigable rivers has changed:

> "The Submerged Lands Act of 1953 did not disturb these doctrines or their inherent limitations. The Act merely confirmed the States' pre-existing rights in the beds of the navigable waterways within their boundaries by, in effect, quit-claiming all federal claims thereto." *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 318 (1973).

The United States has taken an owner's possession of petitioners' property by claiming the right to do so is granted by a servitude—an easement.

III

Petitioners' complaint involves an important federal question which has not been, but should be, settled by this Court.

Upon issuance of a writ from this Court petitioners will detail a commonly known reality: The sand and gravel business in the Ohio River is massive. And, of course, the Ohio does not supply all the nation's needs for sand and gravel. Consequently, a decision by this Court in this case will be of major importance to commerce in both the private and public sectors.

Too, the oyster business along our coast lines will necessarily be affected by the issues argued here. And that business was long ago recognized by this Court as a nationally important one. *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U.S. 82, 86 (1913).

The importance of this matter is also apparent upon consideration of the questions of federalism involved. Not only are the rights of the petitioners, as private state and national citizens, *vis-a-vis* the federal government at issue. But property control, management and disposition—as well as taxation—by the states will be governed to an appreciable extent.*

Finally, petitioners note that this Court, as far as they can determine, has never made a pronouncement on this issue. The Court of Claims, in ruling against petitioners was required to rely upon its own precedent, recently established, that is, the case of *Coastal Petroleum Co.* v. *United States*, 207 C. Cls. 701, 524 F. 2d 1206 (1975).

CONCLUSION

The effect of the Court of Claims rulings in the *Coastal Petroleum Co.* case and in this one is to afford to the United States the authority to "nationalize" the sand and gravel business under the guise of navigation aid. If the government is to be given that authority, it should come from the top.

Respectfully submitted,

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*The counties of Kentucky bordering the Ohio River own the northern half of that river. See *Perks* v. *McCracken, supra.*

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 397-75

(-Not Reported-)
(-to date-)

WENDAL GORDON, et al.,
v.
UNITED STATES

Lee Huddleston, attorney of record, for plaintiffs. *Philip Huddleston*, of counsel.

C. David Redmon, with whom was *Acting Assistant Attorney General Floyd L. France*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

ORDER

This case is before the court on defendant's motion for summary judgment, and plaintiffs' opposition thereto, which has been considered without oral argument. Plaintiffs in this action are seeking compensation under the Fifth Amendment for an alleged taking of their land by the United States. The tract involved is an island, located in the Ohio River; the land consists of some 116 acres above the ordinary high water mark. These 116 acres were condemned by the United States as part of the Smithland Locks and Dams Project in the Ohio River. Compensation was paid to plaintiffs pursuant to the condemnation.

Plaintiffs claim, under their state's law, an interest in the remaining approximately 1,200 acres of the island which lie between the ordinary high water mark and the ordinary low water mark. These acres are usually under water. Defendant admits that it has taken and used the sand, silt, and gravel which constitute the submerged portions of the island in the construction of the Smithland project. It is undisputed that defendant has not sought to condemn these underwater acres or paid plaintiffs for their use.

Plaintiffs contend that the defendant's use of sand, silt, and gravel from the island in the production of cement for the dam project is outside the navigational servitude of the United States. Thus, it is plaintiff's position that while the Government may move away the island, the Government cannot have it. In addition to the Fifth Amendment argument, plaintiffs claim that the defendant's actions have given rise to an implied contract to provide plaintiffs with the value defendant has received from the collateral uses of the submerged acres.

There is no dispute that the Ohio River is a navigable waterway subject to the dominant navigational servitude of the United States. All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution.

Projects undertaken by the Government in aid of navigation are to be viewed in their entirety; even if the Government receives some commercial, collateral benefit from the project, such as the use here of sand and gravel for cement, the acts of the United States remain within

the power of the navigational servitude and do not amount to a taking of any of plaintiffs' property. *Coastal Petroleum Co.* v. *United States*, 207 Ct. Cl. 701, 524 F. 2d 1206 (1975).

Accordingly, no compensation from defendant is due plaintiffs. Defendant's motion for summary judgment is granted, and plaintiffs' petition is dismissed.

IT IS SO ORDERED
BY THE COURT

Wilson Cowen
Chief Judge

September 10, 1976

SUBMERGED LANDS—CHAPTER 29, TITLE 43 U. S. CODE [PERTINENT SECTIONS]

SUBCHAPTER I—GENERAL PROVISIONS

§1301. *Definitions*

When used in this chapter—

(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

(d) The terms "grantees" and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities, public and private corporations, and other persons holding grants or leases from a State,

or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its predecessor sovereign: *Provided, however,* That nothing herein shall be construed as conferring upon said grantees or lessees any greater rights or interests other than are described herein and in their respective grants from the State, or its predecessor sovereign;

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

(f) The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;

(g) The term "State" means any State of the Union;

(h) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

SUBCHAPTER II—LANDS BENEATH NAVIGABLE WATERS WITHIN STATE BOUNDARIES

§1311. *Rights of the States—Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use*

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

Release and relinquishment of title and claims of the United States; payment to States of moneys paid under leases

(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters;

and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on May 22, 1953, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

Leases in effect on June 5, 1950

(c) The rights, powers, and titles hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: *Provided, however*, That, if oil or gas was not being produced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from May 22, 1953 equal to the term remaining unexpired on December 11, 1950, under the provisions of such lease or any extensions, renewals, or replacements authorized therein, or

heretofore authorized by the laws of the State issuing, or whose grantee issued, such lease: *Provided, however,* That within ninety days from May 22, 1953 (i) the lessee shall pay to the State or its grantee issuing such lease all rents, royalties, and other sums payable between June 5, 1950, and May 22, 1953, under such lease and the laws of the State issuing or whose grantee issued such lease, except such rents, royalties, and other sums as have been paid to the State, its grantee, the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States and not refunded to the lessee; and (ii) the lessee shall file with the Secretary of the Interior or the Secretary of the Navy and with the State issuing or whose grantee issued such lease, instruments consenting to the payment by the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States to the State or its grantee issuing the lease, of all rents, royalties, and other payments under the control of the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States or the United States which have been paid, under the lease, except such rentals, royalties, and other payments as have also been paid by the lessee to the State or its grantee;

Authority and rights of the United States respecting navigation, flood control and production of power

(d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

Ground and surface waters west of the 98th meridian

(e) Nothing in this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States.

§1313. *Exceptions from confirmation and establishment of States' title, power and rights*

There is excepted from the operation of section 1311 of this title—

(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

(b) such lands beneath navigable waters held, or any interest in which is held by the United States for

the benefit of any tribe, band, or group of Indians or for individual Indians; and

(c) all structures and improvements constructed by the United States in the exercise of its navigational servitude.

§1314. *Rights and powers retained by the United States; purchase of natural resources; condemnation of lands*

(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

(b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor.